BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PERCY S. TUCKER	)	
Claimant	)	
VS.	)	
	)	Docket No. **1,057,454**
ALFALFA PELLETS, LLC.	)	
Respondent	)	
AND	)	
	)	
BANCINSURE, INC.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the November 23, 2011, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. Andrew L. Oswald of Hutchinson, Kansas, appeared for claimant. Bruce R. Levine of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ, consisting of the November 22, 2011 preliminary hearing transcript, with exhibits, and all pleadings contained in the administrative file.

ISSUES

1. Whether claimant sustained personal injury by accident, or by a series of repetitive accidents, on or about July 13 or July 14, 2011, and whether any such accident(s) arose out of and in the course of employment with respondent. This issue includes whether claimant's alleged accident or accidents were the prevailing cause of his injury.

2. Whether claimant provided timely notice.

3. Whether the ALJ erred in awarding claimant temporary total disability benefits.

4. Whether the ALJ erred in ordering respondent to reimburse claimant's attorney $400 unauthorized medical for an independent medical examination (IME) by Dr. C. Reiff Brown.

Respondent argues that claimant failed to sustain his burden of proof that he sustained personal injury by accident, or by a series of repetitive accidents, arising out of

and in the course of his employment with respondent. Respondent contends that claimant failed to provide timely notice of the accident. Respondent asserts that claimant is not entitled to temporary total disability benefits because claimant testified he can work and also because he applied for unemployment benefits. Lastly, respondent maintains that the cost of Dr. Brown's IME is not recoverable as unauthorized medical.

Claimant argues that the ALJ's preliminary order should be affirmed in all respects.

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant alleges that he sustained injury to his right shoulder by repetitive use on July 13 and July 14, 2011.[1] At the November 22, 2011 preliminary hearing, both counsel stipulated that Sharon Lang, claimant's supervisor,[2] ". . . is an authorized person to receive a workers' comp Report of Accident for purposes of this claim."[3] Claimant was 39 years old when he testified at the preliminary hearing. He had worked for respondent on more than one occasion but most recently from October 2006 until his employment was terminated on August 30, 2011.[4]

Respondent manufactures alfalfa pellets. Claimant was a maintenance man, which required him to work on machinery; use a scoop shovel to load pellets into an auger; make meal; and to "keep the hay dry,"[5] an activity which required the use of a pitchfork.

On July 13, 2011, claimant was ". . . inside a bin shoveling pellets into the auger with a scoop shovel to make a load of meal."[6] While so engaged, claimant felt tenderness in his right shoulder. He described the sensation as feeling ". . . like muscle fatigue."[7] On the morning of July 14, 2011, claimant was working with a pitchfork turning hay. He stopped

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[1] P.H. Trans. at 4-5. Claimant has another claim pending against respondent (Docket No. 1,057,455), however, the preliminary hearing and this Board review are limited to this claim (Docket No. 1,057,454) only. *Id*. at 5.

[2] P.H. Trans. at 19-20.

[3] *Id.* at 13.

[4] *Id.* at 14.

[5] *Id.* at 15.

[6] *Id.* at 18.

[7] *Id.*

and got a drink. As he returned to his task he grabbed the pitchfork with his right arm, which caused a sharp pain in his right shoulder and tingling down the back of his right arm. Claimant went to the office and told Sharon Lang what had happened and that he needed to go to the emergency room.[8] Ms. Lang told claimant to go to the emergency room and to remember to tell the doctor that he shoveled the day before.[9]

Claimant reported to Great Bend Regional Hospital's Emergency Room (ER) at 2:51 p.m. on July 14, 2011. Much of the hospital records are hand written and are accordingly difficult to decipher.[10] However, there are legible references in the records to complaints of right-sided upper chest pain and upper back pain in the area just below claimant's right scapula. Claimant also complained of pain and tingling radiating down his right arm. The history claimant provided to the emergency room personnel was that his pain started a few days ago and had "gotten worse in the last few hours"[11] and that he had experienced a gradual onset of pain "worse since 1 hr ago."[12]

The hospital's ER records also make reference to moderate tenderness in the right shoulder, both anteriorly and posteriorly, and in the right upper chest, including at least a portion of the right shoulder. These areas were apparently tender on palpation. There is no legible reference in the ER records to claimant's work as causing the injury. The diagnosis of the hospital physician, Dr. Mark Van Norden, was a muscle strain. Dr. Van Norden provided claimant with two documents, both dated July 14, 2011: (1) a prescription for Lortab and Flexeril; and, (2) a note stating:

> Percy was in the ER today. It appears his pain is muscular in origin and it is my opinion that this is work related. I would restrict lifting > 10 lbs with the right arm and should follow up with work comp doctor.[13]

Dr. Van Norden told claimant that he had a muscle strain and that it was work related.[14] After receiving the documents from the ER doctor, claimant took the paperwork

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[8] *Id.* at 20, 23.

[9] *Id.* at 23-24.

[10] *Id.*, Cl. Ex 1, Resp. Ex. E.

[11] *Id.*, Resp. Ex. E at 3, 4.

[12] *Id.*, Cl. Ex. 1 at 3.

[13] *Id.*, Cl. Ex. 1 at 6.

[14] *Id.* at 24-25.

to Sharon Lang and handed it to her.[15] After she reviewed the material, Ms. Lang became upset.[16]

Respondent has authorized no medical treatment in this claim.[17] Sharon Lang has not testified.

On July 18, 2011, claimant attended an office visit with his personal care provider, Dr. Paul Wardlaw, but was seen instead by a nurse practitioner, Jacqueline Reed. The history claimant provided to Ms. Reed was: "Rt shoulder pain and decreased rom [range of motion]. Started on 7-15-11 after shoveling. Got worse on Friday moving (?) hay. Went to ER."[18] Ms. Reed recommended an MRI scan of the right shoulder, which was performed at Central Kansas Medical Center on July 22, 2011, by Dr. Ray House. The scan revealed a right rotator cuff tear near its insertion into the humerus. The scan also demonstrated considerable underlying acromioclavicular hypertrophic changes.[19]

Claimant continued to work for respondent on light duty until August 18, 2011, when claimant alleged a separate injury. Following his injury in July 2011, claimant's condition worsened. Claimant was referred by Ms. Reed to an orthopedic specialist, Dr. Ranjan Sachdev.[20] Dr. Sachdev suggested an injection into the right shoulder and physical therapy. Ultimately, claimant was scheduled for a right rotator cuff repair in September 2011, however, claimant cancelled the procedure because respondent was not providing authorized treatment and because claimant's employment was terminated on August 30, 2011, which resulted in the cancellation of claimant's health coverage at midnight on August 31, 2011.[21]

The evidence is conflicting regarding meetings between claimant and respondent on August 12, 2011, and August 24, 2011. Claimant received in the mail a form letter from respondent's health carrier dated August 9, 2011, which requested answers to some specific questions. The letter generally concerned whether the health carrier was responsible to pay for the hospital charges relating to claimant's ER visit on July 14, 2011,

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[15] *Id.* at 25.

[16] *Id.* at 26.

[17] Since claimant was sent to the ER on July 14, 2011, by his supervisor, Ms. Lang, that hospital visit was authorized by respondent. However, it does not appear that respondent paid for that expense.

[18] *Id.*, Cl. Ex. 1 at 17.

[19] *Id.*, Cl. Ex. 1 at 20.

[20] *Id.* at 29; Cl. Ex. 3 at 1. Dr. Sachdev's records are not in evidence.

[21] *Id.* at 32; Resp. Ex. B.

and whether the health carrier had the potential to subrogate against other entities.[22] Claimant did not understand the form and took it to Sharon Lang. Ms. Lang told claimant to take the form to Aaron Spanier, the director of human resources for Innovative Livestock Services, which owns respondent. There was a meeting on August 12, 2011, attended by claimant, Mr. Spanier, and Norbert Schneider, the vice-president of administration for Innovated Livestock Services. According to claimant, Aaron Spanier filled out the letter from the health carrier and claimant signed it.

Claimant's formal education extended through the 11th grade. He estimated that he reads at a 5th grade level. He cannot understand most of the words he reads.[23] When claimant needs assistance understanding a document, he typically asks his 17-year-old daughter to read the document to him.[24] Claimant's testimony regarding his reading ability is uncontradicted.

Among the questions posed on the health insurance document were whether claimant sustained an accident or injury and whether any accident or injury occurred at work or in the performance of duties of employment. Adjacent to those questions the "no" boxes were checked. Mr. Spanier testified that he discussed the form with claimant and went through it with him "line by line"[25] However, Mr. Spanier admitted that he did not read the document to claimant "word for word."[26] Claimant says that he told both Mr. Spanier and Mr. Schneider at the August 12th meeting exactly how his injury occurred. However, Mr. Spanier testified that claimant insisted he could not say that the injury occurred at work but that the ER doctor told him (claimant) that the injury was work-related. Mr. Spanier also testified that he was never told claimant's right shoulder injury was work-related. However, Mr. Spanier admitted having received Dr. Van Norden's July 14, 2011 note, which was originally provided by claimant to Ms. Lang, indicating that claimant's injury was work-related.

Mr. Spanier's version of what was said at the August 12th meeting was corroborated by a memorandum dated August 15, 2011, which was presumably prepared by Mr. Spanier and was signed by both he and Mr. Schneider.

The second meeting occurred on August 24, 2011. The purpose of the meeting was to discuss claimant's August 18, 2011 accident. Aaron Spanier, Norbert Schneider, and

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[22] *Id.*, Cl. Ex. 2, Resp. Ex. A.

[23] *Id.* at 17-18.

[24] *Id.* at 18.

[25] *Id.* at 73.

[26] *Id.*

claimant were in attendance. Claimant was told that accommodated work was no longer available and that there was no need for claimant to contact respondent until after the right shoulder surgery had been performed. According to Mr. Spanier claimant continued to say that his injury was personal, not work-related. Claimant firmly denied that he told anyone that the injury was personal. At the August 24th meeting, claimant was presented with three options, two of which involved the termination of his employment with respondent. The third option involved signing an apparent FMLA form, which would have preserved claimant's employment, without pay, and allowed him to maintain his health coverage for a period of weeks.[27] Claimant refused to sign the document until he consulted with an attorney. Claimant left the meeting. Mr. Spanier testified that he heard nothing further from claimant, who was fired because he "violat[ed] the spirit if not the letter" of the company's policy requiring claimant to maintain contact with respondent during "unexcused absences."[28]

Following the termination of claimant's employment, he applied for and was denied unemployment benefits. In his application for such benefits claimant stated that he was ready, willing, and able to work.

On Novermber 7, 2011, claimant was examined by orthopedic surgeon Dr. C. Reiff Brown. Dr. Brown concluded that ". . . this man has suffered a tear of the right rotator cuff in the work related event that occurred on July 14, 2011," and that "[i]t is probably truer than not that the prevailing cause of the injury was this accident that resulted from repetitive trauma."[29] Dr. Brown recommended medical treatment and placed stringent restrictions on claimant's physical activities.

Claimant testified that he had no difficulties with his right arm or right shoulder prior to July 13, 2011. There is no evidence to the contrary.

PRINCIPLES OF LAW

The 2011 legislative session resulted in amendments to the workers compensation act. L. 2011, Ch. 55, New Sec. 1 provides in relevant part:

> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

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[27] The exact nature of this document is unknown because it was not offered into evidence.

[28] *Id.*, Resp. Ex. B at 1.

[29] *Id.*, Cl. Ex. 3 at 2.

L. 2011, Ch. 55, Sec. 5, K.S.A. 2010 Supp. 44-508 is hereby amended to read as follows: 44-508. As used in the workers compensation act:

> (h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.
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> (d) "Accident" means an undesigned, sudden and unexpected *traumatic* event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
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> (e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
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> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
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> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
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> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
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> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
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> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
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> In no case shall the date of accident be later than the last date worked.
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> (f) (1) "Personal injury" and "injury"mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injuries may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> (A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

L. 2011, Ch. 55, Sec. 16, K.S.A. 44-520 is hereby amended to read as follows: 44-520.

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injurybyaccident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accidentor repetitive trauma, 20calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

> Notice may be given orally or in writing.
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> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
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> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
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> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
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> (b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
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> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[30] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[31]

ANALYSIS

This Board member finds that claimant has sustained his burden to persuade the trier of fact, by a preponderance of the credible evidence, that it is more probably true than not true that claimant was injured in a series of repetitive traumas which commenced on July 13, 2011, and continued on July 14, 2011. The injuries were caused by claimant's repetitive activities at work, specifically using a scoop shovel on July 13th and a pitchfork

[30] K.S.A. 44-534a.

[31] K.S.A. 2010 Supp. 44-555c(k).

on July 14, 2011. The medical records of the ER and the records from physician's assistant Jacqueline Reed, as well as Dr. Brown's report, all document claimant's symptoms in the right shoulder and arm. The opinions of Drs. Van Norden and Brown that claimant's injury was related to his work are uncontradicted. Respondent points to no other event, events, or physical conditions which gave rise to claimant's right rotator cuff tear. Claimant's testimony that he had no difficulties with his right arm and shoulder before July 13, 2011, stands unrefuted. The right shoulder MRI scan did document, in addition to the torn rotator cuff, considerable underlying acromioclavicular hypertrophic changes. However, the record contains no evidence suggesting that those changes had anything whatsoever to do with claimant's shoulder injury.

The claimant's repetitive traumas on July 13 and continuing through July 14, 2011, were the prevailing factor in causing claimant's injury. The nature of claimant's injury was demonstrated both clinically and by the MRI scan. The date of accident pursuant to the newly amended K.S.A. 44-508(e) is July 14, 2011, when claimant was first placed on restricted duty by Dr. Van Norden and also when claimant was advised by Dr. Van Norden that his injury was work related.

The duties of claimant's employment with respondent included repetitive use of scoop shovels and pitchforks. Those duties increased the risk or hazard of injury to which claimant would not have been exposed in normal non-employment life.

According to the testimony of Mr. Spanier regarding the two meetings he and Mr. Schneider had with claimant on August 12th and August 24, 2011, claimant may have either denied his injury was work related or said that he couldn't say if his injury was work related or not. Clearly, claimant was unsure as to the cause of his symptoms. When there is conflicting testimony, as in this claim, the credibility of the witnesses may be important. Here, the ALJ had the opportunity to personally observe claimant and Mr. Spanier testify. The ALJ evidently believed claimant's testimony. Some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify.[32]

Respondent's contention that it did not receive timely notice under the version of K.S.A. 44-520 applicable to this claim is without merit. Claimant's testimony about providing respondent with notice on July 14, 2011, is uncontradicted. Following the sharp increase in claimant's right shoulder and arm symptoms on July 14, 2011, he told his supervisor, Sharon Lang, what had happened and that he needed to go to the ER. Ms. Lang told claimant to go to the ER and to remember to tell the doctor that he (claimant) had been engaged in shoveling the day before. After claimant's discharge from the ER on July 14th, he reported back to Ms. Lang and provided her with the notes from Dr. Van

[32] See *Circle v. Labette County Medical Clinic*, No. 1,055,390, 2011 WL _____ (Kan. WCAB Dec.1, 2011).

Norden which confirmed that claimant's pain appeared to be muscular in origin; that claimant's symptoms were work related; and that claimant needed to follow up with a workers compensation doctor.

Aaron Spanier testified that he had not been "denoted" whether claimant's right shoulder injury was in fact work related or personal in nature.[33] However, Mr. Spanier also testified that he was provided with the same documents claimant handed to Sharon Lang on July 14, 2011. Mr. Spanier received those documents from Ms. Lang on July 20 or 21, 2011. Hence both Ms. Lang and Mr. Spanier were aware within a week following July 14, 2011, that claimant had sustained an injury which was likely work related; that the injury was muscular in nature; and that claimant required further medical treatment.

Notice requires that sufficient information be imparted to the employer from which a reasonable person would have reason to believe, or be placed upon notice, that work activities are or were causing an injury.[34] In this claim claimant clearly complied with the notice requirements of K.S.A. 44-520.

The Board has no jurisdiction to address the issues raised by respondent regarding temporary total disability (TTD) and unauthorized medical compensation. This is a review of a preliminary order and the Board has limited jurisdiction under these circumstances. The Board has jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction.[35] K.S.A. 44-534a (a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified therein. K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the awarding of TTD and medical compensation, including, the Board has held, unauthorized medical.[36]

Here, respondent argues that the ALJ should not have awarded TTD because claimant certified in his application for unemployment benefits that he was ready, willing, and able to work. Respondent also contends that the judge committed error in ordering the reimbursement of $400 unauthorized medical compensation for Dr. Brown's examination because the doctor performed no actual treatment.[37]

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[33] P.H. Trans. at 71.

[34] See *Decker v. Hoskinson Trucking*, No. 1,021,515 2005 WL 1983420 (Kan. WCAB Jul. 27, 2005)

[35] K.S.A. 44-551(i)(2)(A).

[36] *Adams v. Dillards*, No. 1,016,547 2005 WL 1983408 (Kan. WCAB Jul. 29, 2005).

[37] It is noted parenthetically that respondent's counsel stipulated on the record at the preliminary hearing that there was no issue regarding unauthorized medical other than the compensability of the claim. P.H. Trans. at 6. Since the Board has no jurisdiction to address the unauthorized medical issue, the question of whether respondent is bound by that stipulation will not be addressed.

Respondent's arguments regarding TTD and unauthorized medical are not jurisdictional in nature. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[38] Accordingly, respondent's application for Board review is dismissed to the extent of the TTD and unauthorized medical issues.

CONCLUSIONS

(1) Claimant has satisfied his burden of proof to persuade the trier of fact by a preponderance of the credible evidence that it is more probably true than not true that he sustained personal injury by a series of repetitive traumas commencing on July 13 and continuing on July 14, 2011, which arose out of and in the course of his employment with respondent.

(2) Claimant has sustained his burden of proof to persuade the trier of fact by a preponderance of the credible evidence that it is more probably true than not true that he provided respondent with timely notice of his repetitive traumas.

(3) The Board has no jurisdiction to address the issues raised by respondent concerning TTD benefits and unauthorized medical compensation. To the extent of those issues, claimant's application for Board review is dismissed.

WHEREFORE, the undersigned Board Member dismisses respondent's application for Board review to the extent of the temporary total disability and unauthorized medical issues and affirms the November 23, 2011, preliminary hearing Order entered by ALJ Bruce E. Moore to the extent of the Board's jurisdiction, leaving the ALJ's Order in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of January, 2012.

_____
HONORABLE GARY R. TERRILL
BOARD MEMBER

c: Andrew L. Oswald, Attorney for Claimant
Bruce R. Levine, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

[38] See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994)